Supreme Court, U.S.
FILED

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NO. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

John S. Risbeck, et ux.,
Petitioners,

v.

Joseph C. Bond, et ux., et al.
Respondents.

On Petition for a Writ of Certiorari to
the Missouri Court of Appeals,
Southern District

PETITION FOR A WRIT OF CERTIORARI

John S. Risbeck and
Peggy J. Risbeck,
Pro se petitioners.
11220 County Rd. 3040
Rolla, MO 65401
(314) 364-1431

QUESTIONS PRESENTED

With respondents absent, trial court sustained their motions to dismiss, without allowing petitioners notice or a hearing. The Missouri Court of Appeals refused to pass on jurisdictional and due process issues in petitioner's brief and passed sua sponte on an issue not raised on appeal.

1. Is above record sufficient to warrant reversal for unfairness and plain error?

2. Whether 1st Amendment rights of freedom of speech, assembly and to petition the government, allows a layman authorized with a power of attorney to petition the state court in the name of the principal.

3. Whether the inherent power to regulate the practice of law claimed by the Supreme Court of Missouri, prohibits the legislature, using power reserved to the states or the people by the 10th Amendment, from authorizing an attorney in fact to execute and deliver petitions.

PARTIES TO THE PROCEEEDING BELOW

John S. Risbeck, Petitioner

Peggy J. Risbeck, Petitioner

William V. Jones, Respondent

Dena Jones, Respondent

Joseph C. Bond, Respondent

Cathy E. Bond, Respondent

Ethel B. Jones, Respondent

Earle M. Merritt, Respondent

Eva E. Merritt, Respondent

None of the respondents made an appearance on appeal.

Non parties whose interests and positions may be affected by review:

Kenneth E. Hawley

Robert and Wanda Davis

Jay Nixon, Attorney General of Missouri

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INTRODUCTORY PRAYER

Petitioners, John S. and Peggy J. Risbeck, prays that the Supreme Court of the United States grant a writ of certiorari to review the judgment of the Missouri Court of Appeals, Southern District which was entered on September 8, 1994. The judgment affirmed the trial court's order dismissing the petition. The court concluded that an attorney in fact under a durable power of attorney, that is not a licensed attorney at law in this state, cannot file a petition with the court and appear for petitioners.

REFERENCE TO REPORTS OF OPINIONS

The decision and opinion of the Phelps County Circuit Court is unreported and appears in Petitioner's Appendix. The September 8, 1994 decision and opinion of the Missouri Court of Appeals, Southern District has been reported, along with refer-

ences to the denial of the Motion for Rehearing and Application to Transfer.

The reference is cited as Risbeck v. Bond, 885 S.W.2d 749 (Mo.App. S.D. 1994).

JURISDICTION

The judgment of the Missouri Court of Appeals, Southern District, was entered on September 8, 1994. The Court of Appeals denied a timely motion for rehearing on September 29, 1994. The Supreme Court of Missouri denied a timely Application For Transfer on November 22, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 1, Amendment 10, and Section 1 of Amendment 14. See Appendix for text.

Sections 404.710 and 404.717.4 RSMo (1992 Supp.) See Appendix for text.

Sections 484.010 and 484.020 RSMo 1986. See Appendix for text.

STATEMENT OF THE CASE

List of Abbreviations Used:

LF = Appellants' Legal File On Appeal

SLF = Supplemented Legal File

Tr = Appellants' Transcript On Appeal

Br = Appellants' Brief On Appeal

Ap = Appendix

A. Filings In Trial Court

Petitioners and their attorney in fact executed the amended petition filed in the Phelps County Circuit Court. LF p. 18. Pursuant to Missouri Court Rule 55.33(a), Respondents failed to file answers to the amended petition within the time allowed. LF pp. 2-10, 19-26. Petitioners' attorney in fact filed a Motion For A Default Judgment June 1, 1993, and noticed it up for a hearing on June 10, 1993. LF pp. 27- 28, 39. Attorneys for the three Jones re-

spondents filed Motions To Dismiss on June 2, 1993 and June 3, 1993. They did not notice up their motions for a hearing. LF pp. 30-32, 39.

B. Actions Of Trial Court

On June 10, 1993 Petitioners and their attorney in fact, Kenneth E. Hawley, appeared before the court for the scheduled hearing on their motion. No one appeared for the respondents. The judge questioned Hawley about having a bar number. Hawley admitted to not having a bar number and informed the court that he was appointed by a power of attorney to speak for the Petitioners, and claimed statutory authority to act as the Petitioners' substitute. Without passing on the Petitioners' motion that was on the court's docket, the judge sustained the Respondents' motions to dismiss which were not on the docket for judicial action. Hawley's request for leave

to file briefs before the court makes a final judgment was denied. Ir pp. 2-3.

The court then called for the prosecuting attorney, and requested the prosecutor to take notice that Hawley is not admitted to the Bar in Missouri and is practicing law in the Courts in Phelps County. The court turned the case over to the prosecuting attorney after receiving his acknowledgment. Ir p. 4. Hawley was later criminally charged with violating Section 484.020 RSMo 1986.

C. Issues Raised In After Trial Motion

On June 22, 1993, a motion to vacate the judgment was filed. Reasons given were that the respondents' motions to dismiss were a nullity and the judgment was a nullity, because the motions were filed out of time, after a motion for default judgment had been filed. LF pp. 36-37.

D. Federal Issues Raised In After Trial Motion

In the alternative, the following reasons were also listed in the motion:

"4. On June 10, 1993 the plaintiffs appeared for a hearing on their properly noticed and docketed motion for default judgment. The court did not rule on the motion that was properly before the court. Instead, without being on the docket and without notice to the plaintiffs or defendants, and without the presence of the motioning parties or their attorneys of record, the court entered a judgment on the defendants' motions to dismiss. Since the plaintiffs did not receive any notice of the hearing on the motions to dismiss as required by the constitutional due process clause and Rule 43.01, the court lacked jurisdiction to enter the judgment. Therefore, the judgment is void.

"5. And, the trial judge deviated from the required status of neutrality and impartiality as demonstrated by his acts of refusing to entertain the plaintiffs' motion that was properly before the court, and by actively taking over the case for the defendants that were not represented at the hearing, and by ruling on the defendants' motions to dismiss that were not docketed for a hearing.

"6. And, since the plaintiffs were not allowed to prepare and present their arguments and evidence at the hearing, the judgment is not based on the merits.

"7. And, the judgment is contrary to the law since Section 404.710 RSMo (1992 Supp.) authorizes an attorney in fact to execute and deliver a petition for the principal." LF pp. 37-38.

E. Disposition Of Federal Issues By Trial Court

On September 1, 1993 the petitioners noticed their after trial motion for a hearing on September 10, 1993. On September 1 and 7, 1993 the Honorable Judge Douglas E. Long, Jr. continued the hearing set for September 10, 1993 until further order of the court. SLF p. 2-3. See Appendix. Pursuant to Rule 78.06, the motion was denied for all purposes since it was not passed on within 90 days.

F. Federal Issues Raised On Appeal

Petitioners' brief on appeal raised the following due process, plain error and jurisdictional issues in the Points Relied On And Authorities section: (References to authorities have been omitted)

I. Violations Of Due Process Rights

"The trial court erred on June 10, 1993 by taking judicial action on the respond-

ent's motions to dismiss because:

"a. 1. the motions to dismiss were not on the court's docket for adjudication,

"2. the respondents and their attorneys were not present to submit their motions to the court,

"3. the appellants did not have any notice that the hearing on the motions to dismiss would be held on June 10, 1993, in that, the appellants are entitled to reasonable notice of the hearing which is a fundamental principle of procedural due process.

"b. in the absence of the respondents and their attorneys, the court proceeded to question a witness and, then immediately enter judgment against the appellants without first allowing the appellants the opportunity to respond, in that due process principles guarantee the appellants the right to hear the evidence of

the respondents, to cross examine witnesses, and to refute the evidence by presenting their own witnesses and evidence in support of their position.

II. Trial Court Did Not Have Jurisdiction

"The trial court erred on June 10, 1993 by conducting a trial on and by entering a judgment on the respondent's motions to dismiss because:

"a. the parties did not have notice as to the time that the court was going to adjudicate the respondent's motions to dismiss, in that the court lacked jurisdiction over the appellants since the court must possess jurisdiction over the parties by providing them notice before it can adjudicate an issue.

"b. the only motion on the court's docket for adjudication in this case on June 10, 1993 was the appellant's motion for a default judgment, the respondents

and their attorneys were not in attendance at the hearing to present their motions to the court therefore the court's only subject matter jurisdiction was regarding the issues raised in the appellant's motion for a default judgment, in that the court did not have jurisdiction of the subject matter of the respondent's motions to dismiss since the court can only adjudicate what is presented to it by the parties or their attorneys in a manner prescribed by law.

"c. the trial court assumed the role of advocate and counsel for the respondents and set itself in motion to enter a judgment on the respondent's motions to dismiss that were not on the docket for adjudication, acting on the court's own initiative, without prompting from the respondents and without the presence of the respondents or their attorneys, the court,

acting on its own initiative, entered judgment to dismiss the case without possessing any jurisdiction to enter the judgment, in that the court cannot act ex mero muto but is limited to the issues presented to it by the parties." Br pp. 6-9.

III. Other Issues Raised On Appeal

The appeal brief also alleged the trial court erred in the following ways:

1. By dismissing the case without first disposing of the motion for a default judgment, which was on the docket, and before the court in a manner that required judicial determination.

2. Petitioners are entitled by law to obtain a default judgment from the court.

3. The trial court departed from the required status of impartiality and neutrality in the following ways:

a. by not allowing the petitioners

opportunity to present a defense to the charge of the unauthorized practice of law.

b. by taking over the conduct of the case from the respondent's attorneys and prosecuting their motion. Br pp. 9-12.

On appeal, the petitioners abandoned the legal claim that Section 404.710 RSMo (1992 Supp.) authorizes an attorney in fact to execute and deliver petitions.

G. Court Of Appeals Fails To Pass On Federal Issues

The Missouri Court of Appeals failed to pass on any of the issues raised in Petitioners' brief. The Court of Appeals opinion passed on the question of,

> "...whether an attorney in fact under a durable power of attorney can represent appellants by filing a petition with the court and appearing for them." Missouri Court of Appeals Opinion. See Ap p. 2a.

The conclusion was,

"that such an attorney in fact, who is

not a licensed attorney at law in this state, cannot and affirm the trial court's dismissal." Ibid. See Ap p 2a.

H. Court of Appeals Opinion Raises 10th Amendment Issue

The Court of Appeals opinion limits the power of the legislature in the following statement.

> "The legislature may assist the supreme court by providing penalties for the unauthorized practice of law, see Sections 484.010 and 484.020, RSMo 1986, but the legislature can in no way hinder, interfere, or frustrate the supreme court's inherent power to regulate the practice of law." Ibid. See Ap p. 3a.

I. Federal Issues Raised In Motion For Rehearing

Petitioners' timely Motion For Rehearing filed with the Court of Appeals restated the issues that were raised in the brief for determination on appeal. Petitioners raised due process and First Amendment issues with the Court of Appeals in the Motion For Rehearing in the following ways:

"4. The only question that the Court of Appeals addressed was one that appellants, in their brief, did not directly and explicitly raise....Therefore, appellants did not attempt to argue and cite authorities to support their position and to justify their actions by the law. If the Court of Appeals insists on making this an issue, in addition to the issues raised in the brief, then the appellants want to have an opportunity to file a brief with the Court of Appeals on this question. The opportunity to file a brief with the Court of Appeals in support of their position is a fundamental right of due process, one which they were deprived of by the trial court. See Transcript p. 3.

"5. The Court of Appeals misinterpreted the material facts by stating, 'plaintiffs did not purport to represent themselves, but were represented by a person unauthor-

ized to do so.' According to Rule 55.03, a party that is not represented by an attorney at law must sign their pleading and state their address. The fact is that both plaintiffs signed their pleading. See Legal File p. 18. Their signatures on the pleading purports that they are representing themselves. To provide notice to the court and the other parties where the plaintiffs desired responses to the petition to be directed, their attorney in fact, Kenneth E. Hawley, pursuant to Section 404.710.4 RSMo (1993 Supp.) executed the petition as the attorney in fact for the plaintiffs, listed his address, and delivered the petition to the court clerk. The plaintiffs' attorney in fact was authorized to act for the plaintiffs by the public policy of the State of Missouri as expressed in Section 404.710.9 RSMo (1993 Supp.)'... and any provision of law ...to

the contrary shall be void and unenforceable...' The Constitution of the United States, as interpreted by the United States Supreme Court also provides authorization for the plaintiffs to authorize an attorney in fact to speak for them as an exercise of their rights of freedom of speech and the right to assemble to petition the government for the redress of grievances." Motion For Rehearing, pp 3-5.

J. Court of Appeals Disposition Of Federal Issues Raised In Motion For Rehearing

The Missouri Court of Appeals denied the motion for rehearing.

K. Federal Issues Raised In Application To Transfer To Supreme Court Of Missouri

In the Application For Transfer timely filed with the Supreme Court of Missouri, petitioners raised the following questions of importance to be reviewed.

"1. Were the appellants deprived of their rights to due process of law by the

trial court's action in sustaining defendants' motions to dismiss, without having the defendants' motions on the docket, without the defendants or their attorneys present, and without giving the appellants: any notice, any opportunity to present evidence, and any opportunity to file a brief?

"2. By sustaining the defendants' motions to dismiss, did the trial court deprive appellants of their statutory rights under the Durable Power of Attorney statutes to have their attorney in fact 'execute and deliver or accept any deed...petition or other pleading....and to deal with any or all third parties in the name of the principal without limitation.' Section 404.710.4 RSMo (1992 Supp.)?

"3. Did the trial court deprive appellants of their Constitutional rights of free speech and assembly to petition the

government for the redress of grievances?

"4. Is the public policy of Missouri, as expressed by the legislature in Section 404.710.9 RSMo (1992 Supp.) not valid?

"5. Without ruling on the jurisdiction issue raised in the brief, did the Court of Appeals obtain jurisdiction to act?

"6. Is it judicial error for the Court of Appeals to neglect to rule on the issues raised in the Points Relied On section of the appellants' brief and to publish an opinion on an issue that was not raised in the Points Relied On section?" Application For Transfer, p. 1.

L. Supreme Court Disposition Of Federal Issues

The Supreme Court of Missouri denied the Application For Transfer on November 22, 1994.

M. Summary Of Court of Appeals Actions

The Opinion of the Missouri Court of

Appeals did not pass on jurisdictional and due process issues raised by petitioners in their brief. The Court of Appeals passed sua sponte on an issue abandoned by petitioners for the appeal. The petitioners were denied their request to file a brief on the issue raised by the Court of Appeals. The opinion said that the power of the legislature is limited by the inherent power of the Supreme Court.

N. Summary Of Supreme Court Action

By denying the application for transfer, the Supreme Court failed to pass on: the issue of jurisdiction which was raised in the trial court and the Court of Appeals, the due process issues which were raised and not passed on in the trial court and the Court of Appeals, and the First Amendment issues of freedom of speech, assembly and petition, and the validity of the public policy as expressed

in Section 404.710.9 RSMo (1992 Supp.) which were raised in the Supreme Court.

The state's courts have refused to pass on any of the issues raised by the petitioners on all levels. They passed only on one issue sua sponte, without allowing petitioners to file a brief to defend their legal claim of right to access provisions in the Missouri Durable Power of Attorney statutes for petitioning the state's court with an attorney in fact.

REASONS FOR GRANTING THE PETITION

I. Plain Error Was Disregarding The Due Process Decisions Of This Court

Since the Court of Appeals affirmed the trial court's judgment, without passing on the procedural due process issues raised, then this petition should be given consideration under Rule 10.1(c), "... when a state court has decided a federal question in a way that conflicts with the

applicable decisions of this court."

The plain error on the record originates from the trial court's acting in conflict with the well settled decisions of the Supreme Court of the United States in the area of what constitutes due process of law.

A. Principles Of Due Process

It is a well settled area of law that:

1. Before a court can enter judgment, they must obtain jurisdiction, and providing notice to the parties of the pendency of the action is essential for procuring jurisdiction of the court.

2. The second requirement of procedural due process is a meaningful opportunity to be heard.

3. The right to be heard includes the following subsidiary rights:

a. The right to an impartial decision maker.

b. The right of a party to know the claims against them.

c. The right to confront and cross examine opposing witnesses.

d. The right to rebut opposing witness testimony with one's own evidence.

B. Petitioners Were Denied Due Process

It is patent in the record that petitioners were deprived of their due process rights by the trial court in the following ways:

1. Petitioners had no notice in that the respondents' motions were not on the docket for a hearing.

2. The court had no jurisdiction in that without being on the docket, the motions to dismiss were not properly before the court. And without providing notice to petitioners, the court did not obtain jurisdiction to sustain respondents' motions to dismiss.

3. There was no opportunity to be heard in that the judge departed from the required status of neutrality and impartiality and took over the prosecution of the motions of the respondents.

4. Petitioners could not adequately know the claim against them, or confront opposing witnesses when the respondents and their attorneys were not present.

5. Petitioners attempted to present a legitimate defense to the charge of the unauthorized practice of law, and they attempted to present statutory justification, but were prevented by the trial court.

II. The Interest of Justice Consideration

Closely entwined with the grounds for consideration presented above is the interest of justice reason for granting the writ pursuant to 28 USC §2106. All the lower courts have refused to pass on the

due process and jurisdictional issues continuously raised by petitioners. Due to the fundamental unfairness of the proceedings, the granting of a writ of certiorari is required in the interest of justice.

III. Judgment Violates First Amendment Rights and Missouri Statutes

The Court of Appeals opinion is contrary to the claim of right of petitioners based upon the Missouri Durable Power of Attorney statutes and the First Amendment.

A. The Process Of Forming A Group To Collectively Petition The Court

Petitioners are retired adults that are not incapacitated or legally incompetant. The trial court and the Court of Appeals said that they can represent themselves in court. Petitioners were unfamiliar with court rules and procedures, so they were not able to effectively petition the state's court without assistance from someone with some degree of prior legal

knowledge and training.

John Risbeck consulted with various licensed attorneys about the cost of legal representation. Petitioners decided that the cost estimates to acquire access to the courts with a lawyer was prohibitive.

The only reasonable alternative available to petitioners for gaining economically affordable access to the court, was to exercise their First Amendment rights, and associate and consult together with a friend that had some training in the law.

Kenneth Hawley, a house painter, is employed full time by Ken's Contracting Service. He is not, and has never claimed to be a licensed attorney at law.

The use of layman to help other layman gain meaningful access to the courts has been protected from state restrictions by this court under circumstances when there was no other available alternative.

B. Prisoners Are Protected While Helping Other Prisoners To Petition The Court

In Johnson v. Avery, 393 U.S. 483, 21 L Ed 2d 718, 89 SCt 747, the Supreme court addressed the problem of prison inmates helping other prisoners to prepare post-conviction relief petitions. Tennessee adopted a rule that prevented other inmates from giving assistance to those that could not prepare their own writs. In addition,

> "Tennessee does not provide an available alternative to the assistance provided by other inmates." Ibid. U.S. Page 488.

This created the situation, where, in effect, Tennessee denied access to the courts to all prisoners except a few old hands or exceptionally gifted prisoners who are able to help themselves.

The Court concluded that,

> "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not

> validly enforce a regulation...barring inmates from furnishing such assistance to other prisoners." Ibid. U.S. p. 490.

Justice Black, concurring, in a separate opinion said:

> "Laymen--in and out of prison--should be allowed to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar." Ibid. U.S. Page 498.

C. Petitioners Appoint A Layman As Their Attorney In Fact

With no other practical alternative available, petitioners appointed Hawley, pursuant to the Missouri Durable Power of Attorney statutes, to speak and act in their name as their substitute and attorney in fact. The right to appoint the best qualified spokesman of their group is claimed by petitioners as a freedom of speech right. This principle is supported by the opinion of this court in Brotherhood of R. Trainmen v. Virginia, 377 U.S.

1, 6.

> "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program."

D. Statutory Rights Of Attorney In Fact

Section 404.710.4 RSMo (1992 Supp.) empowers an attorney in fact, that is specifically authorized by the principal, with:

> "complete discretion to make a decision for the principal, to act or not act, to consent or not consent to, any act and to execute and deliver or accept any deed, ... release, proof of claim, petition or other pleading, tax document, notice, ... or other document necessary or convenient to implement or confirm any act, transaction or decision."

The execution of a pleading or petition by an attorney in fact, and the delivering of such a document to a court clerk for filing, constitutes an appearance before the court. Both of these acts, the execution

and delivery of pleadings, petitions, and notices are specifically mentioned in the statute as authorized acts for an attorney in fact, even though they constitute an appearance before the court.

Section 404.710.4 RSMo (1992 Supp.) concludes with this sentence:

> "In addition, the attorney in fact has complete discretion to employ and compensate real estate agents, ... and to deal with any or all third parties in the name of the principal without limitation."

By definition, the term parties means persons, therefore, the phrase "any or all third parties" would include any or all third persons. The term "person" is defined in Section 404.703(6) RSMo (1992 Supp.) as, "an individual, corporation, or legal entity;" The term "third person" is defined in Section 404.703(10) to be:

> "`**Third Person**', any individual, corporation or legal entity that acts on a request from, contracts with, relies on or otherwise deals with an attorney in

> fact pursuant to authority granted by a principal in a power of attorney and includes a partnership, either general or limited, governmental agency, ..."

The Phelps County Circuit Court is a person, since the court consists of individuals, and is a legal entity. That the Phelps County Circuit Court is a third person and a third party is evident in the fact that the court consists of individuals, it is a legal entity, and/or it is a governmental agency that acted on a request from, relied on, and otherwise dealt with an attorney in fact pursuant to authority granted by a principal. Section 404.710.4 RSMo (1992 Supp.), therefore, empowers an attorney in fact to deal with the court in the name of the principal, without limitation. (except as provided in subsections 6 and 7, see Appendix)

Section 404.710.9 RSMo (1992 Supp.) states the policy of the state of Mis-

souri:

> "It is the policy of this state that ... if the power of attorney enumerates some express subjects or purposes, with respect to those subjects or purposes, [the attorney in fact shall be accorded the same rights and privileges] as if the principal himself or herself were personally present and acting or seeking to act;"
>
> Section 404.717.4 RSMo (1992 Supp.)

says that this section does not prohibit the principal and attorney in fact from:

> "entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of sections 404.700 to 404.735, with the exception of those acts enumerated in subsection 7 of section 404.710."

Since John S. and Peggy J. Risbeck could personally appear before the court without practicing law in violation of Section 484.020 RSMo 1986, then the policy of the State of Missouri as expressed in their statutes allows their attorney in fact the same right and privilege.

Missouri case law agrees with the public policy as enumerated in the above statutes.

> "Generally speaking, in the absence of any statute otherwise providing, powers or authorities may be created to do any act which the donor himself might lawfully perform." See Magers v National Life and Accident Insurance Co., 329 SW 2nd 752, 758.

E. Court's Policy And Their Application Of Section 484.020 RSMo, Conflicts With First Amendment And Power Of Attorney Statutes

Petitioners claim First Amendment rights to appoint a more qualified layman to act as their spokesman to petition the state's court. In addition, petitioners claim that the Missouri Durable Power of Attorney statutes authorize their use of an attorney in fact to speak for them in the state's court.

The policy adopted by Missouri's courts, of allowing only licensed attorneys at law to appear on behalf of others,

is stated in Sections 484.010 and 484.020 RSMo 1986. The court's policy and the manner in which they applied Section 484.020 in this case conflicts with the First Amendment and the Missouri Durable Power of Attorney statutes which justify the assistance of layman to help others gain access to the courts. Therefore, 28 USC § 2403(b) may be applicable.

Certiorari should be granted for the purpose of settling the constitutional and statutory claims of petitioners that conflict with Missouri's court policy and their application of Section 484.020 RSMo 1986.

IV. Court's Inherent Power Conflicts With Constitutional Legislative Power

Petitioners claim that the legislature has constitutional power to enact Section 404.710 RSMo (1992 Supp.). The Court of Appeals says:

> "The legislature may assist the supreme court by providing penalties for the unauthorized practice of law, see Sections 484.010 and 484.020, RSMo 1986, but the legislature can in no way hinder, interfere, or frustrate the supreme court's inherent power to regulate the practice of law." Ap. p. 3a.

Petitioners interpret this sentence from the Court of appeals opinion to mean that the legislature cannot grant an attorney in fact that is not an attorney at law the same rights and privileges of the principal, and declare that any provision of law contrary to a power of attorney is void and unenforceable.

It is the legislature that makes policy and enacts statutes. The court interprets them and must be bound by them. This court has said, in United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 340:

> "The public policy of the government is to be found in its statutes..."

The same court has said, in Hartford Fire Ins. Co. v. Railway Co., 175 U. S.

loc. cit. 100:

> "Questions of public policy, as affecting the liability of acts done,...are governed by the law of the state, as expressed in its own constitution and statutes..."

The inherent power of the court to regulate the practice of law must be subject to, and bound by, the power reserved to the legislature by the 10th Amendment and the Missouri Constitution.

This court should issue a writ of certiorari to determine if the Supreme Court of Missouri has inherent powers over the citizenry, such that, their legislature is powerless to enact statutes and declare state policy that affects the determination of what constitutes the unauthorized practice of law.

V. Reasons of National Importance

A. Create A Deterrent To Further Abuse Of Due Process.

Granting certiorari on question 1 would

serve as a deterrent to all states' courts from exercising their inherent power to regulate the practice of law in a manner that makes void the well settled principles of due process.

B. Protect First Amendment Rights Against State Sanctions.

The development of the law would benefit by passing on questions two and three. All of the states have statutes or regulations prohibiting the unauthorized practice of law. Probably all states, except perhaps Louisiana, have power of attorney statutes.

Under a claim of inherent power, it is likely that other state courts have or would also refuse to allow litigents access to the courts, by interpreting their very specific power of attorney statutes and by enforcing the vague and broad practice of law statutes in a manner that

discourages people from attempting to ex-exercise their First Amendment rights. This court has already recognized the effect of such regulations on the exercise of First Amendment rights in N. A. A. C. P. v. Button, 371 U.S. 415, 433.

> "These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

A detailed ruling on the relationship between the inherent power of the court to regulate the practice of law, and the legislature's power to make statutes limiting the application of such power, would help to prevent the states' enforcement of unjust infringements on First Amendment rights of freedom of speech, assembly and to petition the government for the redress of grievances.

VI. Personal Reasons For Granting The Petition

The summary of all the reasons that this court should grant a writ of certiorari is that this is America. Our court system should be accessible to not only the rich but also the common citizens. Everyone should be assured by the guarantee of the old maxim of the law that has been applied in countless cases, namely, "Audi alteram partem", the law hears before it decides.

In an effort to access the courts in the most practical way available to us, we relied on the plain and obvious meaning of the Durable Power of Attorney statutes. Judge Douglas E. Long, Jr. made us a public example of how the Phelps County Court deals with citizens that use the power of attorney statutes to obtain assistance from a layman to petition the court.

We filed a complaint with the Commission of Retirement, Removal and Discipline of Judges, only to be told that our complaint is a matter of appeal. We filed an excellent brief alleging judicial misconduct and error, only to have the Missouri Court of Appeals ignore every single issue we raised. We applied to the Supreme Court of Missouri only to be turned down.

The proceedings have been fundamentally unfair and devoid of justice. Even if we are wrong in our understanding of the statutes and the constitution, we at least have a right to be heard. We should not be unfairly penalized for attempting to gain access to the court by using a statute that expresses state policy in very explicit terms.

This case now includes much more than our misplaced driveway. The integrity of the Constitution of the United States and

the Missouri judiciary is here at risk, as well as the principles of truth and justice.

CONCLUSION

The record is very short. The transcript is only four pages and the brief is twenty-four pages. The attorneys withdrew from the case and the respondents filed nothing on appeal. The brief cites many Missouri authorities favorably interpreting the due process clause that directly relate to the facts of this case.

Petitioners pray that this court:

1. Check the record,
2. Grant certiorari,
3. Reverse the decision with a summary judgment on the merits of question one,
4. Remand the case back to the trial court for further consideration.

Since there are no other parties in this court, petitioners pray that the

court issue an order assessing costs against William and Dena Jones, the only surviving respondents that filed motions, or against the State of Missouri for acting without jurisdiction.

In the alternative, petitioners pray for this court to:

1. Grant certiorari,

2. Pass on the jurisdictional issues raised, and reverse the judgment,

3. Issue an opinion on any other questions you choose.

Petitioners again pray that the court issue an order assessing costs against William and Dena Jones or against the State of Missouri, and do whatever justice requires under the circumstances.

Respectfully Submitted by:

John S. and Peggy J. Risbeck,
Pro se petitioners.
11220 Co. Rd. 3040
Rolla, MO 65401
(314) 364-1431

APPENDIX

Missouri Court of Appeals
Southern District
Division Two

JOHN S. RISBECK and PEGGY J. RISBECK,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 18888
JOSEPH C. BOND and CATHY E. BOND and WILLIAM V. JONES and DENA JONES and ETHEL B. JONES, and EARLE M. MERRITT and EVA E. MERRITT,	)	
Defendants-Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF
PHELPS COUNTY

Honorable Douglas E. Long, Jr., Judge

AFFIRMED

Pursuant to motions to dismiss, the trial court dismissed plaintiffs petition. In their notice of appeal plaintiffs concisely define what occurred saying, "Plaintiff's Attorney-in-Fact filed and

signed a Petition To Quiet Title in the name of and place of plaintiffs. Case dismissed."

In the trial court, and here, as best as we understand appellants' brief, the question is whether an attorney in fact under a durable power of attorney can represent appellants by filing a petition with the court and appearing for them. We conclude that such an attorney in fact, who is not a licensed attorney at law in this state, cannot and affirm the trial court's dismissal.

"Missouri has adopted a policy that the practice of law and the doing of law business, both in and out of its courts, shall be limited to persons with specific qualifications and duly licensed as attorneys." D Pass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146, 148 (banc 1940).

An examination of the "Durable Power of

Attorney Law of Missouri", Sections 404.700-404.735, RSMo Supp. 1993, indicates no authority to an attorney in fact to act as an attorney at law. An attorney in fact under that law may perform such acts as the principal "may carry out through an agent". Section 404.710.2. Such an attorney in fact may also employ and compensate an attorney. Section 404.710.4. Appellants cite us to no provision of the act authorizing an attorney in fact to act as an attorney at law.

Moreover, it is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized. In re First Escrow, Inc., 840 S.W.2d 839, 842 (Mo. banc 1992). The legislature may assist the supreme court by providing penalties for the unauthorized practice of law, see Sections 484.010 and 484.020, RSMo 1986, but the

legislature can in no way hinder, interfere, or frustrate the supreme court's inherent power to regulate the practice of law. In re Thompson, 574 S.W.2d 365, 367 (Mo. banc 1978); Automobile Club of Missouri v. Hoffmeister, 338 S.W.2d 348, 355 (Mo.App. 1960).

An agent or attorney in fact, who is not an attorney at law, cannot file pleadings for another or otherwise practice law. A natural person, not a licensed attorney at law may represent themselves in court, but not others. Liberty Mut. Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945, 955 (banc 1939); Property Exchange & Sales v. Bozarth, 778 S.W.2d 1, 3 (Mo.App. 1989). There is a partial exception for applications for writ of habeas corpus. See State v. Carroll, 817 S.W.2d 289 (Mo.App. 1991).

As plaintiffs' petition was not signed

by an attorney at law, see Rule 55.03, and as plaintiffs did not purport to represent themselves, but were represented by a person unauthorized to do so, the trial court properly dismissed the petition. Property Exchange & Sales v. Bozarth, supra, 778 S.W.2d at 3. Nothing stated in this opinion should be construed to prevent an attorney in fact from proceeding in court for the principal with a Missouri licensed attorney at law or if the attorney in fact is an attorney at law licensed here. When and how that can occur is not an issue here.

The order dismissing the petition is affirmed.

James K. Prewitt, Judge

Crow and Parrish, JJ., concur.

Judgment entered on September 8, 1994.

Missouri Court of Appeals
Southern District
Division Two

JOHN S. RISBECK and PEGGY J. RISBECK,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 18888-2
JOSEPH C. BOND and CATHY E. BOND and WILLIAM V. JONES and DENA JONES and ETHEL B. JONES, and EARLE M. MERRITT and EVA E. MERRITT,	)	
Defendants-Respondents.	)	

ORDER

On September 29, 1994 the Court issued the following Order:

"Now on this day, the Court, having fully considered appellants' Motion for Rehearing or to Transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer."

In the Supreme Court of Missouri

No. 77389

S.D. No. 18888

September Session, 1994

John S. Risbeck, et al., Appellants,

vs. (TRANSFER)

Joseph C. Bond, et al., Respondents.

Now at this day, on consideration of appellants' application to transfer the above-entitled cause from the Southern District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1994, and on the 22nd day of November, 1994, in the

above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 22nd day of November, 1994.

Thomas F. Simon Clerk

M I N U T E S

Phelps County Circuit Court

Civil Division

JOHN S & PEGGY J RISBECK

VS. CV393-0217CC

JOSEPH C BOND, et al

Date: 06/10/93 Time: 9:00 am Room: 100

Judge: Honorable Douglas E. Long, Jr.

Event Type: Court Trial

HAWLEY, KENNETH	Copy Sent
Lange, C. William	Copy Sent
Williams, John Z.	Copy Sent
KING, PATRICK	Copy Sent

CASE DISMISSED. THE MOTIONS TO DISMISS

FILED BY DEFENDANTS HEREIN ARE SUSTAINED AS PLAINTIFF'S PETITION IS FILED BY "ATTORNEY IN FACT" NOT BY "ATTORNEY AT LAW" AND THEREFORE IS SUBJECT TO DISMISSAL BECAUSE OF THE UNAUTHORIZED PRACTICE OF LAW BY A PERSON WHO IS NOT AN ATTORNEY AT LAW IN THE STATE OF MISSOURI. DOUGLAS E. LONG, JR., JUDGE

PAGE: 1 06/11/93 9:08:41

Text of Constitutional and Statutory Provisions Involved

Constitution of the United States,

Amendment I:

"Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V:

"No person shall...be deprived of life,

liberty, or property, without due process of law;"

Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 404.710 RSMo (1992 Supp.):

"404.710 Power of attorney with general powers.--1. A principal may delegate to an attorney in fact in a power of attorney general powers to act in a fiduciary ca-

pacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. A power of attorney with general powers may be durable or not durable.

"2. If the power of attorney states that general powers are granted to the attorney in fact and does not enumerate one or more express subjects or purposes for which general powers are conferred, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power which an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section.

"3. If the power of attorney states

that general powers are granted to an attorney in fact with respect to one or more express subjects or purposes for which general powers are conferred, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power, but only with respect to the specific subjects or purposes expressed in the power of attorney that an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section.

"4. Except as provided in subsections 6 and 7 of this section, an attorney in fact with general powers has, with respect to the subjects or purposes for which the powers are conferred, all rights, power

and authority to act for the principal that the principal would have with respect to his or her own person or property as a nondisabled and nonincapacitated adult; and without limiting the foregoing has with respect to the subjects or purposes of the power complete discretion to make a decision for the principal, to act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim, petition or other pleading, tax document, notice, application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction or decision. In addition, the attorney in fact has complete discretion to employ and compensate real estate agents, brokers, at-

torneys, accountants and subagents of all types to represent and act for the principal in any and all matters, including tax matters involving the United States government or any other government or taxing entity, and to deal with any or all third parties in the name of the principal without limitation.

"5. An attorney in fact, who is granted general powers for all subjects and purposes or with respect to any express subjects or purposes, shall exercise the powers conferred according to the principal's instructions, in the principal's best interest, in good faith, prudently and in accordance with sections 404.712 and 404.714.

"6. No power of attorney, whether durable or not durable, and whether it grants general powers for all subjects and purposes or with respect to express subjects

or purposes, shall be construed to grant authority to an attorney in fact to carry out any of the following actions unless the actions are expressly enumerated and authorized in the power of attorney:

"(1) To execute, amend or revoke any trust agreement;

"(2) To fund with the principal's assets any trust not created by the principal;

"(3) To make or revoke a gift of the principal's property in trust or otherwise;

"(4) To disclaim a gift or devise of property to or for the benefit of the principal;

"(5) To create or change survivorship interests in the principal's property or in property in which the principal may have an interest;

"(6) To designate or change the desig-

nation of beneficiaries to receive any property, benefit or contract right on the principal's death;

"(7) To give consent to an autopsy or postmortem examination;

"(8) To make a gift of the principal's body parts under the Uniform Anatomical Gift Act;

"(9) To nominate a guardian or conservator for the principal; or

"(10) To give consent to or prohibit any type of health care, medical care, treatment or procedure to the extent authorized by sections 404.800 to 404.865.

"7. No power of attorney, whether durable or not durable, and whether or not it delegates general powers, may delegate or grant power or authority to an attorney in fact to* do or carry out any of the following actions for the principal:

"(1) To make, publish, declare, amend

or revoke a will for the principal;

"(2) To make, execute, modify or revoke a living will declaration for the principal;

"(3) To require the principal, against his or her will, to take any action or to refrain from taking any action; or

"(4) To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

"8. A third person may freely rely on, contract and deal with an attorney in fact delegated general powers with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly identifies the specific property, account, security, storage facility or matter as being within the scope of a subject or purpose contained in the power of attorney, and without regard to whether

the power of attorney expressly authorizes the specific act, transaction or decision by the attorney in fact.

"9. It is the policy of this state that an attorney in fact acting pursuant to the provisions of a power of attorney granting general powers shall be accorded the same rights and privileges with respect to the personal welfare, property and business interests of the principal, and if the power of attorney enumerates some express subjects or purposes, as if the principal himself or herself were personally present and acting or seeking to act; and any provision of law and any purported waiver, consent or agreement executed or granted by the principal to the contrary shall be void and unenforceable, unless any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim,

petition or other pleading, tax document, notice, application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction or decision, expressly modifies the provisions of the power of attorney pursuant to section 404.717.

"10. Sections 404.700 to 404.735 shall not be construed to preclude any person or business enterprise from providing in a contract with the principal as to the procedure that thereafter must be followed by the principal or the principal's attorney in fact in order to give a valid notice to the person or business enterprise of any modification or termination of the appointment of an attorney in fact by the principal; and any such contractual provision for notice shall be valid and binding on the principal and the principal's successors so long as such provision is rea-

sonably capable of being carried out.

"(L. 1989 H.B. 145 5, A.L. 1991 S.B. 148)

"*Word 'to' does not appear in original rolls."

Section 404.717.4 RSMo (1992 Supp.)

"404.717. Modification and termination of power of attorney and liability between principal and attorney in fact.--1....

"4. This section does not prohibit the principal, acting individually, and the person designated as the attorney in fact from entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of sections 404.700 to 404.735, with the exception of those acts enumerated in subsection 7 of section 404.710."

Section 484.010 RSMo 1986

"484.010. **Practice of the law and law business defined.**--1. The **"practice of the law"** is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

"2. The **"law business"** is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in drawing for a valuable consideration of any paper, document or instrument affecting or relat-

ing to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

Section 484.020 RSMo 1986

"484.020. Who shall engage in the practice of law or do law business--penalty.--1. No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, engage in the practice of law or do law business as defined in section 484.010, or both.

"2. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover for such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the

state of Missouri.

"3. It is hereby made the duty of the attorney general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name of and on behalf of the state.

Supreme Court, U.S.
FILED
APR 7 1995
OFFICE OF THE CLERK

NO. 94-1575

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

John S. Risbeck, et ux.,
Petitioners,

v.

Joseph C. Bond, et. ux., et al.,
Respondents.

On Petition for a Writ of Certiorari to
the Missouri Court of Appeals,
Southern District

RESPONDENT'S BRIEF IN SUPPORT OF PETITION

Kenneth E. Hawley,
Pro se respondent.
116 S. Walker Ave.
Rolla, MO 65401
(314) 364-5787

QUESTIONS PRESENTED FOR REVIEW

These questions are subsidiary questions that are fairly included in Petitioners' question number 2.

1. Whether Section 484.020.1 RSMo 1986 is unconstitutionally vague and in violation of due process requirements, by failing to give adequate notice that the statute applies to a layman, attorney in fact, acting pursuant to a power of attorney.

2. Whether the Missouri court policy of defining what is and what is not the authorized and unauthorized practice of law on a case by case basis, violates due process requirements by not providing a clearly defined standard which gives notice to the public as to what exactly is prohibited.

PARTIES TO THE PROCEEEDING BELOW

John S. Risbeck, Petitioner

Peggy J. Risbeck, Petitioner

William V. Jones, Respondent

Dena Jones, Respondent

Joseph C. Bond, Respondent

Cathy E. Bond, Respondent

Ethel B. Jones, Respondent

Earle M. Merritt, Respondent

Eva E. Merritt, Respondent

Kenneth E. Hawley, Respondent

Non parties whose interests and positions may be affected by review:

Robert and Wanda Davis

Jay Nixon, Attorney General of Missouri

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Respondent's Interest In The Case And Facts Supporting Claim Of Being An Omitted Party Pursuant To Rule 12.4

I serve the petitioners in a fiduciary capacity as their attorney in fact. My interest in this case is in every practical sense identical with that of the petitioners. Our principal/attorney in fact relationship is but the medium through which the petitioners seek to make more effective the expression of their own views in petitioning the government for the redress of grievances.

My relationship to the petitioners is essentially analogous to that of the N.A.A.C.P. and its members, as this court has determined in N.A.A.C.P. v. Button, 371 U.S. 415, 443, 9 L.Ed. 2d 405, 424.

> "[the NAACP] and its members are in every practical sense identical. The Association,...is but the medium through which its individual members seek to make more effective the expression of their own views."

I am interested in the outcome of this case because, this court may determine whether Missouri law and the Constitution of the United States allows an attorney in fact, that is not also a licensed attorney at law, to execute and deliver petitions for a principal and to speak for them in court. This issue is of particular interest to me since, the State of Missouri attempted to prosecute me for practicing law without a license and may again initiate another prosecution for my role in assisting the petitioners with their appeals.

My status as a party below is evident from the following facts in the record:

1. All of the motions, pleadings and other captioned documents filed in the Phelps County Circuit Court on behalf of the petitioners identified and named the plaintiffs in the following manner in the caption:

John S. Risbeck and
Peggy J. Risbeck, Plaintiffs,
By and Through Kenneth E. Hawley,
Plaintiff's Attorney in Fact.

See: Petition To Quiet Title, Notice of Lis Pendens, Amended Petition To Quiet Title, Judgment attached to Motion For Default Judgment According to Rules 54.02 and 74.05, and Motion To Vacate Judgment Pursuant To Rule 75.01, Phelps County Circuit Court Case Number CV393-0217CC and Appellants' Legal File On Appeal Number 18888-2 In the Missouri Court of Appeals Southern District, pages 10 and 28.

2. All of the pleadings, notices and motions mentioned in the above paragraph were signed by Kenneth E. Hawley. Ibid.

3. The defendants were directed by the clerk to serve a copy of their pleading upon Kenneth Hawley at his address. Appellants' Legal File On Appeal, supra, pages 2, 4, 6, 8, 19, 21, 23, and 25.

4. In the Case History in the Phelps County Circuit Court, on page 3, the first entry for 05/03/93 identifies the attorney in fact that filed the amended petition as a "third party."

5. On June 10, 1993, at the only court hearing in this case, Hawley was the only party that spoke to the court. The petitioners were also present but they did not say even one word. See Appellants' Transcript On Appeal, pages 2-4.

6. I was named in the judgment of the Phelps County Circuit Court, but not by my name. Instead of my name, I was identified by my statutory title of "attorney in fact" and by the word "person" as is indicated in the quotation below.

> "Case dismissed. The motions to dismiss filed by defendants herein are sustained as plaintiff's petition is filed by 'attorney in fact' [Kenneth E. Hawley] not by 'attorney at law' and therefore is subject to dismissal because of the unauthorized practice of law by a

person [Kenneth E. Hawley] who is not an attorney at law in the state of Missouri. Douglas E. Long, Jr., Judge."

7. The minutes of the Phelps County Circuit Court show that the court sent copies of the above judgment to the following parties: Kenneth Hawley, the attorneys for the defendants C. William Lange and John Z. Williams that were not present at the hearing, and the Phelps County Assistant Prosecuting Attorney Patrick King that witnessed the hearing where I spoke for the petitioners. The petitioners did not receive from the court a copy of the judgment dismissing their case.

8. At the direction of the petitioners, the Phelps County Circuit Court, the Missouri Court of Appeals, and the Supreme Court of Missouri all communicated with the petitioners by responding directly to Kenneth E. Hawley at Hawley's address and

telephone number.

9. Although I have not signed any court pleadings on appeal, I have continued to act as the petitioner's attorney in fact throughout all the appeals process.

Only parties may be named in the caption of the case. In general, only pro se parties or a licensed attorney at law can sign and file pleadings and motions, receive responsive pleadings, notice and docket hearings, speak as a litigant in court, and receive the official communications of the actions of the court. From the beginning of this action, I have been accorded the legal rights of the petitioners, and have been treated and named by the court as a third party.

STATEMENT OF THE CASE

The statement of the case in the Petition For A Writ Of Certiorari Sections A and B on pages 3-5 are incorporated herein

by reference. The following needs to be added at the end of Section B.

On July 30, 1993, I was criminally charged with a non-class misdemeanor of practicing law without a license. The charge alleged that I made an appearance in a representative capacity on behalf of someone else in the Circuit Court of Phelps County, Missouri, in the case styled John S. and Peggy J. Risbeck v. Joseph C. Bond, et. al, No. CV393-0217CC in violation of Section 484.020, RSMo.

I challenged the constitutionality of the statute, alleging that it violated the due process clause of the Missouri and the United States Constitutions. I also defended my action by a claim of right under the First Amendment of the Constitution of the United States and by the authority given in Section 404.710 RSMo (1992 Supp.) which outlines the authority, rights and

privileges of an attorney in fact.

As a result of my affirmative defenses, and without obtaining any concessions, promises or plea agreements from me, on January 20, 1994 the prosecuting attorney dismissed the charge.

SUMMARY OF ARGUMENT

In reviewing a statute affecting First Amendment rights, this court should also consider other possible factual applications in addition to the facts in the case at bar. A criminal prosecution resulted from the events of this case. The facts and issues in the criminal case also has a direct effect on obtaining a just outcome of the petitioners' case. The facts and constitutional issues associated with the criminal case should also be considered in reviewing the petitioners' case.

The trial court's actions provide evidence that the judgment dismissing peti-

tioners' case, was based upon the statutes that define the practice of law and which prohibit the practice of law by any person that is not duly licensed therefore. If these statutes are found to be unconstitutionally vague, then the order dismissing the case is a nullity.

In determining the constitutionality of a statute affecting First Amendment freedoms, the court applies strict standards requiring very specific and narrowly written regulations in order to avoid, in the statute's application, the infringement of First Amendment freedoms.

A statute is unconstitutionally vague when it fails to give notice as to whom it applies, or fails to give notice as to what is prohibited. Vague statutes violate the principles of the due process clause. The associated criminal case that charged respondent with practicing law without a

license, provides probative evidence that the Missouri statutes prohibiting the practice of law by unlicensed persons are unconstitutionally vague.

Missouri's practice of law statutes are unconstitutionally vague because they fail to make clear whether a personal appearance as an attorney in fact in a fiduciary capacity, and the execution and filing of a petition in that capacity, is or is not the appearance as an advocate in a representative capacity.

Missouri courts have declared that they will not be hindered by the legislature in their function of defining and regulating the practice of law. By not defining the practice of law, the court decides on a case by case basis what is or is not the unauthorized practice of law. This results in the court constructing statutes, without any enforceable standard. This prac-

tice violates due process principles as expressed by this court.

The statute says an attorney in fact can execute and deliver petitions and the respondent and petitioners in good faith acted upon that authority. The Court of Appeals, in affirming the trial court's dismissal of the case, says such an attorney in fact must also be an attorney at law. This limitation to the statute that was added by the court, conflicts with the authority granted in the statute in a manner that unjustly punishes the petitioner for doing what the statute says can legally be done. In addition the Court of Appeals ruling creates a crime, nunc pro tunc, that originates in the common law which is contrary to Missouri's criminal code.

ARGUMENT SECTION

A. Court Can Consider Applications Of Statute In Other Factual Contexts

In considering the allegations that the statutes are unconstitutional which are raised in this brief and in the petition for writ of certiorari filed herein, this court should not limit its consideration to just the facts that are included in the petition for writ of certiorari. Since the rights of the petitioners and myself, acting as their attorney in fact, are inseparable, the constitutionality and the inhibiting effect of the application of Section 484.020 RSMo in the State's attempt to convict me for practicing law without a license should also be considered. The concept of not limiting the court's consideration to just the facts at bar is well established in First Amendment cases.

> "Furthermore , the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar....[citations omitted] It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement." N. A. A. C. P. v. Button, supra. U.S. 432.

B. Trial Court Acted In Reliance Upon Sections 484.010 And 484.020 RSMo 1986

That the trial court sustained respondent's motions to dismiss in reliance upon Sections 484.010 and 484.020 RSMo 1986 is evident in the following ways:

1. The motion to dismiss filed by C. William Lange, which the court sustained, referred to Chapter 484 for authority in support of the motion.

2. The trial court confessed belief in a law that makes filing a petition or ap-

pearing for someone without having a bar number to be the unauthorized practice of law.

3. The trial court, after sustaining respondent's motions to dismiss:

A. called for the prosecuting attorney,

B. asked the prosecuting attorney to take note that I was not admitted to the Bar in Missouri and was practicing law in the Courts of Phelps County, and

C. turned the case over to the prosecuting attorney. See Transcript p. 4.

If Sections 484.010 and 484.020 RSMo are unconstitutional, as petitioners and this respondent allege, then the judgment dismissing petitioners' case is a nullity.

C. Strict Standards Apply To Regulations In The Area Of First Amendment Freedoms

The practice of law statutes impose criminal sanctions upon and severely limit the exercise of the Constitutionally guar-

anteed rights of freedom of speech, assembly and to petition the government.

In the case at bar, petitioners, in the Petition For A Writ Of Certiorari outline their claim of right under the First Amendment to have an attorney in fact speak for them in the state's court, on pages 25-34. By stating that the policy of the court and its application of Section 484.020 RSMo 1986 is in conflict with the First Amendment, and by the statement that 28 USC § 2403(b) may be applicable, the petitioners are challenging the constitutionality of the state statute.

This court should not presume that the statute and the Missouri court policy curtails constitutionally protected activity as little as possible. The principles in N.A.A.C.P. v. Button are controlling here.

"If the line drawn by the decree be-

> tween the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." N.A.A.C.P. v. Button, supra. U.S. p. 432.
>
> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Ibid. at U.S. 433.

D. Vague Statutes Violate Principles Of Due Process

That the definitions for the practice of law and the doing of law business in Section 484.010 RSMo 1986 are unconstitutionally vague are manifested in the facts arising from this case. Judge Douglas E. Long, Jr. dismissed the petitioner's case on belief that the statutes prevented me from executing and delivering a petition and appearing with the petitioners in the Phelps County Circuit Court. But the prosecuting attorney was convinced by my af-

firmative defenses that the statute was not adequate to convict me for appearing with the petitioners in open court. The judges and the prosecuting attorney differred as to the statute's application to the facts of this case.

That men learned in the law cannot agree on the application of the statute, is probative evidence that the statute is unconstitutionally vague. As this court has said in Baggett v. Bullitt, 377 U.S. 360, 367, 12 L.Ed. 2d 377, 382, 84 S.Ct. 1316,

> "...a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."

Due process requires that penal statutes not leave room for speculation as to what is required or forbidden.

> "As a matter of due process, no one may be required at peril of life, liberty or property to speculate as to

> the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 48 L.Ed. 243, 253, 96 S.Ct. 1755.

E. Practice Of Law Definition Fails To Define A Key Phrase So As To Give Notice As To Whom The Statute Applies

The definition of the practice of law in Section 484.010.1 RSMo 1986 is unconstitutionally vague by not defining precisely what constitutes "the appearance as an advocate in a representative capacity," so as to give notice as to whom the statute is intended to apply.

When a principal, pursuant to Section 404.710.1 RSMo (1992 Supp.),

> "...delegate[s] to an attorney in fact in a power of attorney general powers to act in a fiduciary capacity on the principal's behalf..."

there is no reason to conclude that the statute defining the practice of law attaches criminal liability to someone acting pursuant to Section 404.710.1 RSMo

(1992 Supp.).

Without a precise definition of what constitutes the "appearance as an advocate in a representative capacity" making clear that it either includes or excludes the appearance as an attorney in fact in a fiduciary capacity, Section 484.010 and 484.020 are unconstitutionally vague.

F. Missouri Court Opinions Conflict With Due Process Decisions Of This Court

Missouri's court has said,

> "The legislative department, under the police power, may enact laws declaring that certain acts constitute unauthorized practice of law and are punishable." Automobile Club of Missouri v. Hoffmeister, 338 S.W. 2d 348, 355.

By implication, if the legislature can declare that certain acts constitute the unauthorized practice of law, they can also declare, that certain acts that would otherwise be prohibited, are allowed as exceptions to the practice of law definition. For example, both Section 532.020

and 404.710 RSMo give laymen, acting on behalf of someone else, authority to sign petitions.

> "Application for the writ shall be made by petition, signed by the party for whose relief it is intended, or by some person in his behalf, to some court of record, or to any judge thereof other than a municipal judge." From Section 532.020 RSMo 1986.

Missouri courts have upheld this statute in the following way:

> "The exception formulated in Hackin allowed a layperson to prepare and file a petition for writ of habeas corpus on behalf of another;...
>
> "This court adopts the exception created by and the reasoning advanced in the Hackin case....This holding applies only to the preparation and filing of habeas petitions....Such activity is an exception to the practice of law definition under Section 484.010.1, supra, and therefore does not constitute a misdemeanor." State v. Carroll, 817 S.W. 2d. 289, 291 (Mo. App. 1991).

In like manner, Section 404.701.4 says in part:

> "Except as provided in subsections 6 and 7 of this section, an attorney in fact has, with respect to the subjects

> or purposes for which the powers are conferred, all rights, power and authority to act for the principal that the principal would have with respect to his or her own person or property as a nondisabled and nonincapacitated adult; and without limiting the foregoing has with respect to the subjects or purposes of the power complete discretion to act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any deed,...proof of claim, petition or other pleading,...or other document necessary or convenient to implement or confirm any act, transaction or decision."

The Court of Appeals in the case at bar has in effect nullified the authority granted an attorney in fact by the statute by interpreting the statute according to their policy which they claim supercedes the statute.

> "Missouri has adopted a policy that the practice of law and the doing of law business, both in and out of its courts, shall be limited to persons with specific qualifications and duly licensed as attorneys....
>
> "An agent or attorney in fact, who is not an attorney at law, cannot file pleadings for another or otherwise practice law." Risbeck v. Bond, 885 S.W. 2d. 749, 750 (Mo.App. S.D. 1994).

This interpretation is obviously not what the legislature intended to convey. An attorney at law already has authority to execute and deliver petitions and other pleadings, because of his/her license to practice law. One does not have to appoint an attorney at law to act as attorney in fact, in order for the attorney at law to be able to execute and deliver petitions on behalf of someone else!

This illogical interpretation of the statute by the Court of Appeals arises from the fact that the court refuses to be bound by the statutory definition of the practice of law, and by implication, the exceptions to the definition that are in other statutes like Section 404.710, supra.

> "Moreover, it is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized....The legislature may assist the supreme court by

> providing penalties for the unauthorized practice of law,...but the legislature can in no way hinder, interfere, or frustrate the supreme court's inherent power to regulate the practice of law." Risbeck v. Bond, supra.
>
> "The power to regulate and define the practice of law and the doing of law business is a prerogative of the judicial department. The legislative department, under the police power, may enact laws declaring that certain acts constitute unauthorized practice of law and are punishable. But such statutes are merely in aid of, and do not supercede or detract from the power of the judicial department to define and control the practice of law....
>
> "What constitutes the practice of law and the doing of law business is extremely difficult to define. Courts have therefore been reluctant to adopt an all-inclusive definition of those terms. Rather the determination of any issue that presents the question must depend upon the facts in each particular case." Automobile Club of Missouri v. Hoffmeister, supra.

These opinions demonstrate that the courts, on a case by case basis, may, or may not choose to be influenced, limited, or otherwise bound by legally legislated, fixed standards, of what constitutes statutory exceptions to the definition of the

practice of law.

The vague practice of law and doing of law business statutory definitions, and the policy of the Missouri courts of avoiding an all inclusive definition of those terms, leaves the public, judges, and juries free to decide on a case by case basis what is prohibited without any fixed standards. These standardless definitions and court policies violate the principles of due process.

This Court has said,

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurers free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case...
>
> "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an un-

derstandable meaning with legal standards that courts must enforce." Giaccio v. Pennsylvania 382 U.S. 399, 402-403, 15 L.Ed. 2d 447, 450, 86 S.Ct. 518.

G. Conflict Between Missouri Court Opinion And Power Of Attorney Statute Unjustly Punishes The Petitioners

As the facts of this case demonstrate, Section 404.710 RSMo (1992 Supp.) gives an attorney in fact authority to execute and deliver petitions and other pleadings. And, the Missouri Court of Appeals has said that the attorney in fact that executes and delivers petitions must also be a licensed attorney at law.

The plain meaning of the Court of Appeals' ruling is that a layman acting as an attorney in fact can perform any of the acts authorized in Section 404.710 except execute and deliver petitions and other pleadings. By saying that only an attorney in fact that is also an attorney at law can be authorized to execute and deliver

petitions and other pleadings, the Court of Appeals has acted nunc pro tunc by correcting the language and meaning of the statute.

The Court of Appeals construction of Section 404.710 makes the executing and delivering of a petition by a layman attorney in fact to be the crime of practicing law without a license. In Missouri there are no common law crimes. Offenses must be defined by statute.

> "No conduct constitutes an offense unless made so by this code or by other applicable statute." Section 556.026 RSMo 1986.
>
> "'**Offense**' means any felony, misdemeanor or infraction." Section 556.061 (19) RSMo 1986.

Neither Section 404.710 or Section 484.010 RSMo, or any other Missouri statute informs the public that an attorney in fact that executes and delivers petitions must also be an attorney at law.

The construction of Section 404.710 by the Court of Appeals, as outlined above, is in conflict with the decision of this court as expressed in United States v. Laub, 385 U.S. 475, 486-487, 87 S.C. 574.

> "If there is a gap in the law, the right and duty, if any, to fill it do not devolve upon the courts....
> "Crimes are not to be created by inference. They may not be constructed nunc pro tunc."

Because of the authorization given to an attorney in fact in the statute and a constitutional claim of right, criminal charges of practicing law without a license were dismissed. Additionally, for acting on the authorization in the statute and a constitutional claim of right, the petitioners' case has also been dismissed. It is fundamentally unfair for me to get by with impunity for my role in assisting the petitioners in presenting their cause to the court, while the petitioners are

punished by having their case dismissed, since I assisted them in making their petition to the court.

Although petitioners are not being criminally punished, the principles outlined in United States v. Laub are controlling here.

> "Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in Raley v. Ohio, 360 US 423, 438, 3 L Ed 2d 1344, 1355, 795 SCt 1257, we may not convict 'a citizen for exercising a privilege which the state clearly had told him was available to him'" Ibid. U.S. 487.

Since the petitioners and I were acting in good faith reliance upon authority given to us by the state in Section 404.710 RSMo (1992 Supp.), therefore the judgment dismissing petitioner's case should be reversed.

CONCLUSION

When an untrained layman cannot afford

to hire an attorney at law, the functioning of the court would work more efficiently and the petitioner's ideas would be expressed more effectively, when assisted by another layman that has some degree of legal training, knowledge and experience. The appearance as an attorney in fact in a fiduciary capacity should be treated by the courts in the same manner as if the principal appeared pro se.

Respondent prays that the court grant certiorari, reverse the judgment, and remand the action back to the trial court with instructions to allow respondent to speak and act according to the will and wishes of the petitioners in the Phelps County Circuit Court.

Respectfully Submitted by:

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